

**From:** mayer ilovitz  
**To:** Microsoft ATR  
**Date:** 1/27/02 5:42pm  
**Subject:** Microsoft Settlement

[Text body exceeds maximum size of message body (8192 bytes). It has been converted to attachment.]

To: Renata B. Hesse  
Antitrust Division  
US Department of Justice  
601 D Street NW  
Suite 1200  
Washington, DC 20530-0001

Under The Tunney Act, I would like to add some comments on the proposed Microsoft settlement.

By this point, you will have received many letters from those who have presented the flaws of the proposed settlement in far more detail and far more eloquently than I could at this late date. However, I feel compelled to reiterate some of their points.

- The very history of this proposed settlement is disconcerting. It was created by a newly appointed head of the antitrust division of the DOJ and Microsoft's lawyers. By all reports, all the other DOJ lawyers, who had spent years on the case, all the other State's lawyers and their technical support staff were excluded from these proceedings. Though I am not a lawyer, what I have read of the settlement itself and the many reviews about it, the document reads like something that was dictated entirely by Microsoft's lawyers and provides a "settlement" overwhelmingly to Microsoft's benefit, and little to no long term benefit for anyone else.

- The settlement specifies an enforcement mechanism that for all practical purposes would be toothless. It specifies a three member committee to oversee the judgment. However, Microsoft would have influence over the selection of one ( if not two ) of the members. This is like asking the fox to guard the hen house. Further their authority would extend only to "assisting in voluntary dispute resolution". Worse, according to the settlement, none of their findings or recommendations could be used in court in enforcement proceedings nor would they even be allowed to report any of their findings or recommendations to the Courts or Congress.

- While it makes some attempts to address the issues related to the "big 20" OEMs, it does nothing for smaller OEMs, corporations, universities or smaller end users. Contracts such as MS's "Enterprise Agreement" are ignored.

The Enterprise Agreement can provide sizable discounts on MS software and upgrades. However, the big catch to this agreement is that the company must use MS products instead of alternatives. Even in a healthy economy, the pressure to minimize expenses are great. In a less than ideal market, it only gets much worse. So, to take advantage of discounts in Windows & Office, one is forced to accept Outlook and Internet Explorer and reject Netscape Navigator and other alternative products. Potentially, the wording of the Enterprise Agreement might even be interpreted to prohibiting the use of Linux, BSD or some other non-MS PC desktop and server operating system. The combination of things like the EA and the propensity for Windows based applications to treat the presence of non-MS applications as a "problem" that needs to be fixed, leads many corporate IT groups to give in and convert to "pure MS" desktops that excludes non-MS components.

- The definitions of the terms "Windows OS", "API", and "Middleware" specified in the settlement are so restrictive

that future implementations and trivial derivations of major middleware and API components would be exempt from any restrictions. Further major current and imminent applications, APIs, and middleware products are completely ignored.

.NET, the linchpin in Microsoft's effort to build an Internet equivalent to its Desktop domination, is completely ignored by the settlement. The .Net initiative has been public knowledge for a long time now, but there is no reference to it in the settlement.

Likewise, the MS Office suite is completely excluded. The single strongest weapon in Microsoft's arsenal for protecting the Windows Desktop monopoly has been, and continues to be, MS Office. Time and again, the number one reason given for having to use Windows on the Desktop is the need for compatibility with MS Office documents and applications. Thus, it could easily be argued that MS Office constitutes a monopoly situation in its own right. Further, MS's frequent changes in document formats between revisions of the product forces all users to upgrade en masse to newer versions of Office ( and usually newer versions of Windows). This both further adds to MS's (prodigious) revenue stream and makes it very difficult ( if not impossible) for third parties to create compatible products. The specifications for all MS Office documents and API interfaces must be made open and available in a timely fashion for this monopoly to be broken.

Also, the many offshoots of Windows are ignored by the settlement. No mention is made of WindowsCE, Pocket PC, Tablet PC or X-BOX, which is really just a slightly stripped down PC running a variant of Windows. Each represents Microsoft's efforts to leverage its Windows monopoly into other market areas.

- The Settlement displays numerous anti-"Open Source" biases. Many experts agree, and the top executives at MS have essentially admitted, that Open Source is the single greatest threat to Microsoft's monopoly. The existence of operating systems like Linux and the BSD variants, applications and middleware products like Apache webservers, SAMBA file and print sharing have permitted many to reject Microsoft's Windows Desktop and Server OS platforms in favor of alternatives. Yet, the settlement threatens all of this.

The settlement does nothing to prevent MS from retaliating against an OEM that ships a PC that is preloaded with only a non-MS operating system. Further, alternate Operating System vendors such as BE were ultimately driven out of business because OEMs refused to preload BeOS in addition to Windows. Their reason: fear for their license agreements with Microsoft.

The way the settlement is worded, MS would be able to deny Open Source developers access to APIs, communication protocols and other documentation essential to maintaining compatibility with their Windows counterparts.

The restrictions on document disclosure as they relate to "encryption, authentication anti-piracy" and related issues as determined by Microsoft presents many opportunities for mischief on Microsoft's part.

The settlement makes no references to restrictive licensing conditions such as: preventing the distribution of otherwise redistributable components when it is done ONLY for use by MS-based products and on MS-based Operating Systems,

and explicitly forbids its distribution for use with open-source products and OSes.

- The settlement does nothing to address Microsoft's use of its monopoly derived power and financial resources to push into new areas with the intent to claim a dominant position. Their huge cash horde ( by some recent reports in excess of 30 billion dollars ) puts them in a position to trivially crush a competitor in any new ventures.

- With the the X-BOX, Microsoft is targeting the game console market. This system is essentially a slightly stripped-down PC running a variant of Windows. Reviewers of the system have said that it has features significantly beyond those of its competitors and is selling the units at a serious loss. This is in combination with a reported 500 million dollar ad campaign. At the same time Microsoft used its power to convince many musicians to provide their music for use in MS XBOX games for little or no financial compensation in exchange for mentioning of the band's name in the game.

In most cases, one would have to dig into the bowels of the games to find out who provided the music. Normally, companies would pay tens of thousands for such music per game. ( see New York Times 11/15/2001 - THE POP LIFE; For Musicians, Microsoft's Xbox Is No Jackpot ) .

Recently, Microsoft announced that its next target will be the "Gameboy" handheld game market.

- Microsoft for several years has been pushing to get cable and DSS providers to use MS-based set-top decoder boxes.

In general, the providers have refused, fearing a repeat of MS's takeover of the PC. MS appears to now be using its financial muscle to buy its way into the settop market. It provided large sums of cash to help Comcast win its bid for AT&T's cable system. Recently, directly and through his Foundation, Gates purchased 500 million dollars worth of Cox Communication stocks. In both cases, it will be much harder for these cable companies to reject the replacement of set top boxes with those that are Microsoft-based.

- Microsoft continues its push to dominate the Internet.

.NET is Microsoft's latest attempt to redefine the Internet on its terms. This would extend its monopoly from the desktop to the Internet.

Either by outright purchasing or dealmaking, Microsoft is forcing more and more dialup and DSL/cable end users to use

MSN. At the same time, Warner Cable has complained that inherent incompatibilities in Windows XP prevents their high-speed cable systems from working with XP-based computers. This would not be the first time that Microsoft implemented incompatibilities with the express purpose of hindering a competitor ( the DR-DOS case ).

By the use of EULAs or the explicit design of websites owned by Microsoft or its partners, non-MS browsers and

Operating Systems are blocked from accessing various websites and services. The EULA for MSNBC's NewsAlert

software only permits you to run the software on systems running a non-competing operating systems. It has been

reported that Microsoft and its partners have, either intentionally by design or unintentionally by using an MS product,

built websites that explicitly recognize connection attempts by Netscape/Mozilla clients and reject the connection.

When the users changed the client identification to something else, the problem went away.

- Microsoft's involvement in things like E-Books and Digital Rights Management also concern me. I am concerned that

Microsoft will use its dominant positions to make these things only available on MS-compatible/approved products.

For these and many other reasons, the proposed settlement, as currently presented and without major revisions, must be rejected. The alternative will lead to an even greater monopoly extending far beyond the PC Desktop and into many other aspects of our digitally-enabled world.

Mayer Ilovitz  
New York, NY